No. 93-832

(3)

Supreme Court, U.S.
FILED
JAN 20 1994
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In The

Supreme Court of the United States

October Term, 1993

ST. ELIZABETH MEDICAL CENTER,

Petitioner,

vs.

JIMMIE DEAN BROWNING, *et al.* and CONEY MITCHELL,

Respondents.

On Petition for Writ of Certiorari to the Ohio Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondents' civil lawsuits against Petitioner involve allegations that Petitioner, St. Elizabeth Medical Center (hereinafter "SEMC"), was negligent in granting and continuing staff privileges of certain incompetent physicians, and that as a proximate result of Petitioner's negligence Respondents were seriously and permanently injured by malpractice committed by those physicians. Respondents' claims are brought under the common law of Ohio, which provides that a hospital has an independent duty to exercise reasonable care to ensure that only competent physicians are granted and retain privileges within the hospital. Under Ohio law, a hospital is liable for injury caused by an incompetent physician who was negligently retained by the hospital.

Respondents' claims were dismissed by the trial court on summary judgment. The trial court held that, as a matter of law, the claims were barred by the statute of limitations set forth in Ohio Revised Code 2305.11(B)(1), which applies to "medical claims." The court of appeals reversed the decision of the trial court, and the Ohio Supreme Court affirmed. The Supreme Court set forth the following rules of law in the syllabus of its decision:[1]

> 1. Hospital negligence arising out of the "care" of a patient is a "medical claim" within the meaning of R.C. 2305.11(D)(3) and is subject to the period of limitations set forth in R.C. 2305.11(B)(1). "Care" as used in R.C. 2305.11(D)(3) is the prevention or alleviation of a physical or mental defect or illness.

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1. This Court has recognized that "except for *per curium* opinions, it is the settled rule in Ohio that its Supreme Court speaks as a court only through the syllabi of its cases." *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976).

> 2. Negligent credentialing of a physician by a hospital is not "medical diagnosis, care, or treatment" within the meaning of R.C. 2305.11.
>
> 3. An action against a hospital for bodily injury arising out of the negligent credentialing of a physician is subject to the two-year limitations period set forth in R.C. 2305.10.
>
> 4. The period of limitations set forth in R.C. 2305.10 commences to run when the victim knows or should have discovered that he or she was injured as a result of the hospital's negligent credentialing procedures or practices.
>
> 5. R.C. 2305.25 does not provide a hospital with immunity from liability for the hospital's negligence in granting and/or continuing the staff privileges of an incompetent physician.

Browning v. Burt, 67 Ohio St. 3d 1439 (1993), syllabus.

As the syllabus clearly evinces, the Ohio Supreme Court's decision involves only issues of Ohio tort law. Nevertheless, Petitioner seeks to have this federal court review and ultimately reverse the Ohio Court. In short, St. Elizabeth Medical Center argues that the United States Constitution mandates that it be granted immunity for Respondent's claims, and that, as a matter of constitutional law, Respondents' claims are time barred. These arguments are without legal support, and do not warrant review by this Court.

REASONS FOR DENYING THE WRIT

I. Introduction

The Questions Presented for Review by Petitioner are utterly without foundation, and in fact border on the frivolous. For example, Question Number 1 asks whether "the Ohio Supreme Court's abolition of the immunity conferred by Ohio Revised Code § 2305.25 constitutes a denial of due process. . ." In point of fact, the Ohio Court did not abolish an immunity conferred by the statute, but rather, the Court interpreted the language of the statute and held that it did not confer immunity under the circumstances of this case.[2]

Question Number 2 is equally flawed. The Ohio Supreme Court did not, as Petitioner claims, deny hospitals the benefit of a statute of limitation. The Court merely clarified when a claim such as Respondents' would accrue for the purpose of the statute of limitations, and put to rest any question as to which Ohio statute of limitation applies thereto.[3]

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2. Petitioner contends that the question of whether SEMC was immune from liability under Ohio law was "not raised by any party." Petitioner's Brief at 5. This contention is patently false. In point of fact, SEMC argued to the Ohio Supreme Court that Revised Code § 2305.25 provided SEMC with "immunity [which] constitutes another basis for upholding the trial court's dismissal of Plaintiff's claims against SEMC." Brief of Appellant SEMC at 34 n. 14. SEMC placed this issue squarely before the Court and should not be heard to complain that the Court considered, and rejected, SEMC's interpretation of the statute.

3. Petitioner states that, in briefing this issue to the Ohio Supreme Court, the parties stipulated that Ohio Revised Code § 2305.11, the "medical claims" statute of limitations, applied to this case. This statement is simply untrue. No such stipulation was entered into by the parties. Moreover, regardless of the arguments made to the lower Courts involving the applicable statute of limitation, the Ohio Supreme Court correctly applied Revised Code § 2305.10 to these actions. Petitioner's contention that the Court was bound to apply the (Cont'd)

Finally, Question Number 3 is nothing more than an attempt to forge a federal constitutional issue out of a decision involving only the interpretation of state law. Petitioner accuses the Ohio Supreme Court of bias solely because the Court used strong language in response to a disturbing, but undisputed, fact pattern. Petitioner, however, has failed to set forth any support for its contention that the Court's legal analysis was in any way influenced by those facts. Rather, the decision of the Ohio Court demonstrates that the Court conducted a detailed and careful analysis of Ohio law, and set forth its rulings on the legal issues independent of the facts.

The Ohio Court's decision does not present an issue which warrants review by this Court. Accordingly, SEMC's Petition for Writ of Certiorari should be denied.

II.

28 U.S.C. § 1257 PROHIBITS THIS COURT FROM REVIEWING A NON-FINAL STATE COURT DECISION WHICH INVOLVES ONLY ISSUES OF STATE LAW.

Petitioner maintains that this Court has been granted the authority to review the Ohio Supreme Court's decision by 28 U.S.C. § 1257, which confers upon the United States Supreme Court jurisdiction to review final judgments of state courts. As Professor Moore has explained, however, "the right to review provided by § 1257 is not unlimited. The prerequisites for review

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(Cont'd)
wrong statute of limitations merely because neither party argued that the right one should apply is an inaccurate statement of the law. When a court is asked to determine the applicable statute of limitation, it should consider all of the statutes and apply the correct one, regardless of whether one party or the other so argued. *See, e.g. Val Decker Parking v. Corn Product,* 411 F.2d 85 (6th Cir. 1969).

under the section are designed to assure that the policy of achieving consistent decisions as to federal rights is fulfilled with the least possible federal intrusion into state judicial processes." Moore's Federal Practice, ¶ 505.01.

The prerequisites for review under §1257 are that there must be a final judgment or decree by the highest court of the state, and that the decision must bring into question a federal constitutional issue. Obviously, as these cases have not yet been tried, and no final decree has been entered, the prerequisites for review have not been fulfilled. *See, e.g. San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621 (1981) (dismissing appeal for lack of final judgment where state court had remanded action for new trial). The Ohio Court's decision is not a "final judgment or decree," but instead merely remands the action for trial on the merits. The decision, therefore, is not subject to review by this Court.

Moreover, the Ohio Supreme Court's decision involved only the interpretation and application of Ohio statutory and common law. Section 28 U.S.C. §1257 does not confer upon this Court jurisdiction to review questions involving state law. "The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock v. City of Memphis,* 87 U.S. 590, 626 (1875).

In this case, the Ohio Supreme Court examined Respondents' causes of action against Petitioner, and concluded that they were not "medical claims" within the meaning of Ohio Revised Code § 2305.11, which provides a one year limitation period for all such claims. The Court held that instead the claims were governed by the two year limitation period set forth in Revised Code § 2305.10, which applies to actions for personal injury.

The Court also rejected Petitioner's claim that Ohio Revised Code §2305.25, the Ohio Peer Review Statute, confers immunity upon SEMC for Respondents' claims. The Court scrutinized the language of the statute, considered its purpose, and concluded that under the circumstances of this action, Petitioner did not fall within the class of persons to whom the statute conferred immunity.

That the decision of the Ohio Court, interpreting various state statutes, may not be scrutinized by this federal Court is well embodied in our dual system of jurisprudence. This Court must accept the "construction of the laws of the state by its highest court. . ." *Nickey v. Mississippi*, 292 U.S. 393, 396 (1933).

> . . . [T]he courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; . . . this Court's power to review decisions of state courts is limited to their decisions on federal questions; and . . . the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 680 (1929).

Nevertheless, Petitioner attempts to skirt this venerable principle of Supreme Court jurisprudence by fabricating several due process arguments out of the Ohio Supreme Court's interpretation and application of Ohio law. Petitioner claims that because Ohio Revised Code § 2305.251 renders privileged certain information which may or may not be germane to Petitioner's

defense, Petitioner's right to due process is violated and Petitioner is therefore entitled to immunity for those claims. Petitioner also argues that the Ohio Court's application of its decision to the parties before it constitutes a denial of due process. Finally, Petitioner accuses the Ohio Supreme Court of bias in violation of Petitioner's right to due process.[4] These contentions are unsupported by both law and fact, and do not provide a basis for review by this Court.

A. The Ohio Supreme Court's Interpretation of Revised Code § 2305.25, Rejecting Petitioner's Contention That the Statute Conferred Immunity for Respondent's Claims, Does Not Raise a Federal Issue, and Is Not Subject to Review by This Court.

Petitioner argues that Revised Code § 2305.251 could potentially deprive it of due process because the statute might prevent Petitioner from presenting certain information in its

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4. Petitioner also contends that the Ohio Court's decision "undermine[s] important federal . . . policies intended to assure quality medical care to the public." Petitioner's Brief at 13. Even if this contention were true, it would not confer jurisdiction upon this Court to review the Ohio Court's decision on issues of Ohio law. Moreover, the Ohio Court's decision is supported by the very policy Petitioner claims is undermined. Petitioner contends that the policy behind the Health Care Quality Improvement Act of 1986, § 402, 42 U.S.C. § 11101, is undermined by the Ohio law. According to the Act, Congress found that "[t]he increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems. . . ." 42 U.S.C. § 11101. Moreover, the Act specifically provides that "[n]othing in this chapter shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician . . ." 42 U.S.C. § 11105(d). Clearly the primary policy behind the Act, the protection of patients from medical malpractice, is furthered, and not undermined, by the Ohio Court's decision.

defense at the trial of this action.[5] Accordingly, Petitioner claims that it is necessary for this Court to review the Ohio Supreme Court's interpretation of Revised Code § 2305.25 that the statute does not confer immunity to Petitioner for Respondents' claims. Essentially, Petitioner argues that because of the privilege created by Revised Code § 2305.251, the Constitution mandates that § 2305.25 be interpreted as conferring a corresponding immunity.

The Ohio Supreme Court considered, and rejected, Petitioner's argument. The Court found that the privilege conferred by Revised Code § 2305.251 does not prevent Petitioner from presenting evidence in defense of this action in light of the express language of the statute, which states that:

> . . . Information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented during proceedings of a committee nor should any person testifying before a committee or who is a member of the committee be prevented from testifying as to matters within his testimony before the committee or opinion formed by him as a result of the committee hearing.

As the clear language of the statute demonstrates, and as the Ohio Supreme Court correctly noted, Petitioner's claim that its defense will somehow be hindered by the privilege created by Revised Code § 2305.251 is without merit.

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5. Revised Code § 2305.251 provides that "[p]roceedings and records of all review committees described in section 2305.25 . . . shall not be subject to discovery or introduction in evidence. . . No person in attendance at a meeting of a review committee . . . shall be permitted or required to testify. . . as to any . . . matters produced or presented during the proceedings . . ."

Moreover, even if Petitioner's claim had some legal basis, the issue is not yet ripe for review by this Court. Petitioner's defense of this action has not been hindered, and until this action proceeds to trial, there can be no determination as to whether or not Revised Code § 2305.251 actually deprives Petitioner of the right to present an available defense. Petitioner is, in effect, requesting that this Court render an advisory opinion on the Constitutionality of Revised Code § 2305.251, in direct contravention of 28 U.S.C. § 1257, which authorizes this Court to review only final judgments or decrees by state courts. *See, San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981), *supra*, at 5.

Finally, Petitioner's contention, that this Court should review and reverse the Ohio Court's interpretation of Revised Code § 2305.25 because § 2305.251 allegedly could violate Petitioner's right to present every available defense, is fundamentally flawed. Even if Revised Code § 2305.251 could somehow deprive Petitioner of due process by hindering its defense to this action, the appropriate remedy is not to re-write Revised Code § 2305.25 to provide for an immunity not conferred by the Ohio legislature, but rather to invalidate Revised Code § 2305.251 as being in conflict with the Fourteenth Amendment.

Significantly, Petitioner has not requested that this Court review the constitutionality of the privilege created by Revised Code § 2305.251. If this Court were to do so and agree with Petitioner that the statute violated Petitioner's right to due process, the statute would be nullified and SEMC would be permitted to present, in its defense, any information currently privileged under the statute. Accordingly, such a result would enable Petitioner to present the defenses which it claims are hindered by the statute. SEMC does not, however, seek the opportunity to present every available defense, although it is its right to do so which Petitioner alleges is violated by the statute. Rather, Petitioner seeks to avoid a hearing on the merits altogether, and argues that it is entitled to

immunity from Respondents' claims. Obviously, Petitioner's contention that Revised Code § 2305.251 could prevent it from presenting all available defenses is simply a thinly veiled attempt to fabricate a constitutional argument out of what is clearly an issue of state law. Ohio Courts have the supreme power to interpret Revised Code § 2305.25. The Ohio Supreme Court has done so, and has determined that it does not confer an immunity upon SEMC under the facts of this case. That decision is not subject to review by this Court.

B. Petitioner's Argument That Retroactive Application of the Ohio Court's Decision Deprives It of a Vested Right Without Due Process Is Contrary to Established Law.

Petitioner contends that the Ohio Court's holding should not be applied to the parties herein because to do so would be to deprive Petitioner of a vested right without the due process guaranteed by the United States Constitution. This contention lacks merit and, in fact, is in direct conflict with both established doctrine and recent pronouncements by this Court on this issue.

For example, this Court has recently explained that when a court decides to effect some change in the law, a question may arise as to whether or not the change should be applied retroactively, although "[i]n most decisions... retroactivity . . . goes without saying." *James B. Beam Distilling Co. v. Georgia,* 501 U.S. —, 115 L. Ed.2d 481 at 490 (1991).

> [The practice of applying a change in the law to the parties before the court] is overwhelmingly the norm . . . and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law . . . It also reflects the declaratory theory of the law . . . according to

> which courts are understood only to find the law, not to make it.

Id. at 488 (citations omitted). Furthermore, as this Court has even more recently explained, "[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for near a thousand years.' *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J. dissenting)." *Harper v. Virginia Dept. of Taxation*, 61 U.S.L.W. 4664, 4666 (1993).

Nevertheless, Petitioner erroneously argues that *Chevron Oil v. Huson*, 404 U.S. 97 (1971) forbids retroactive application of the Ohio Supreme Court's decision. To the contrary, *Chevron Oil* merely permits "the denial of retroactive effect to a 'new principle of law' if such a limitation would avoid 'injustice or hardship' without unduly undermining the 'purpose and effect' of the new rule." 61 U.S.L.W. at 4666.

In this action, the Ohio Court chose to give its decision both retroactive and prospective application.[6] That choice of law does not violate the Federal Constitution. Moreover, a denial of retroactive effect would have undoubtedly unduly undermined the purpose and effect of the rule set forth by the Ohio Court: to permit persons who suffered injuries as a result of a hospital's negligent credentialing practices to "have their day in court." 66 Ohio St. 3d at 565. Prospective only application of the rule would have caused Respondents and others similarly situated to risk the loss of their right to pursue their legal remedies before they could have even

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6. It should be noted that the Ohio Court did not, as Petitioner claims, create a "new" rule of law. Rather, the Court merely applied the established "discovery rule" to the facts of this case. Prior to this action, the Ohio Supreme Court had not had the opportunity to determine when a negligent credentialing cause of action would accrue for the purpose of the statute of limitations.

known that they may have a cause of action. Thus, prospective only application would completely frustrate the purpose of the rule as set forth by the Ohio Court.

The Ohio Court was not constitutionally bound to apply *Chevron Oil, supra,* to determine whether or not to apply its ruling to the parties in this case. Moreover, even if the Court were so bound, *Chevron Oil* supports retroactive application under the circumstances. The Ohio Court's application of it decision does not raise a federal constitutional issue for review by this Court.

C. Petitioner's Claim That the Ohio Supreme Court Was Other Than an Impartial Decisionmaker Is Without Support.

It is a settled principle of law that "bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case. . ." *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 347 (3rd Cir. 1987) (citations omitted). Nevertheless, Petitioner accuses the Ohio Supreme Court of bias solely because the Court ruled adverse to Petitioner, and used strong language in response to an indisputably disturbing fact pattern.[7] Petitioner's contention is entirely without merit.

In its opinion, the Ohio Court set forth the facts, which Petitioner conceded were not in dispute, to facilitate its substantive analysis.[8] The Court then engaged in a lengthy and well reasoned

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7. The language of which Petitioner complains is found only in the Court's conclusion. Petitioner does not take issue with the language used by the Court in its syllabus, statement of facts, or legal analysis.

8. Ironically, for the most part, the Supreme Court's statement of facts was taken directly from Petitioner's Appellate Brief to that Court. *See* Brief of Appellant, SEMC.

discussion of the applicable law, the history thereof, and the various policy considerations at issue. Finally, the Court explained that the trial court erred in holding that the Respondents' claims were time barred under Ohio law. There is no evidence whatsoever that the Court's legal analysis was in any way influenced by emotion or other improper motivation.

Furthermore, even if Petitioner could establish that the Ohio Supreme Court has been biased by its exposure to the evidence presented thereto, such a showing would not form the basis for a reversal of the Ohio Court's opinion. Rather, the appropriate remedy would simply be for the Ohio Court to be recused from further participation in this action. *See e.g. Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96 (3rd Cir. 1991) (finding that ". . . the district court's explanation of the burden of proof was correct. The court's opinion reflects that it carefully analyzed the various views . . . and adopted a workable standard . . . ." but nevertheless assigning the case to another judge for further proceedings to preserve the appearance of impartiality).

Absent evidence that the Ohio Court's ruling was somehow effected by an improper motivation, Petitioner is not entitled to have the Court's well-reasoned decision set aside. Petitioner has not alleged such evidence exists, and cannot present such evidence. SEMC's mere allegation that it was denied an impartial decisionmaker does not suffice to create a federal issue for review by this Court. Accordingly, the Petitioner should be denied.

CONCLUSION

In accordance with the foregoing, Respondents respectfully request that this Honorable Court deny SEMC's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — BRIEF OF APPELLANT ST. ELIZABETH MEDICAL CENTER IN THE SUPREME COURT OF OHIO

NO. 91-2079

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS SECOND JUDICIAL DISTRICT MONTGOMERY COUNTY, OHIO

JIMMIE DEAN BROWNING, et al.,

Plaintiff-Appellees,

vs.

JAMES C. BURT, M.D.,

Defendant,

MAX BLUE, M.D. and ST. ELIZABETH MEDICAL CENTER,

Defendant-Appellants.

APPELLANT, ST. ELIZABETH MEDICAL CENTER'S BRIEF

STATEMENT OF THE CASE

A. Background of the Litigation

This is one of forty-four (44) similar actions filed in Montgomery County. All of these cases involve claims of medical malpractice against Dr. James Burt and allegations that St. Elizabeth Medical Center ("SEMC") was negligent in allowing and continuing Dr. Burt's privileges. Before the court of appeals ruling here, a dozen of these cases, including plaintiff-appellees' action, were summarily adjudicated by several trial court judges as

barred by the statute of limitations. The first of these cases on appeal, *Hanks v. Burt,* was affirmed by the Montgomery County Court of Appeals; thereafter, this Court denied Plaintiffs' Motion to Certify. *Hanks v. Burt* (Jan. 25, 1991), Montgomery Ct. App. 12257, unpublished, Motion to Certify overruled (July 3, 1991), Sup. Ct. No. 91-625.

In the instant case, the court of appeals, by decision dated August 20, 1991, reversed the summary judgment for St. Elizabeth Medical Center ("SEMC") and also overruled its own opinion in *Hanks,* issued just seven months earlier. In so doing, the court of appeals adopted and applied a new test for the accrual of negligent credentialling actions against a hospital. This new test was not briefed or argued by any of the parties. Several days after the *Browning* decision, the same court again applied this new rule to reverse a summary judgment based on the statute of limitations in *Mitchell v. Burt* (Aug. 26, 1991), Montgomery Ct. App. No. 12224, Motion to Certify granted (January 22, 1992), Sup. Ct. No. 91-2121.

On September 5, 1991, two weeks after the Appellate Court's ruling in *Browning,* Common Pleas Judge Robert D. Nichols (sitting by designation in twenty-two of the cases) issued a decision granting summary judgment to SEMC in nineteen cases on the basis of the statute of limitations (and other grounds.[1] Judge Nichols noted that the *Browning* decision conflicts with *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131 and other rulings of this Court. After analyzing this Court's rulings on the discovery rule in malpractice cases, Judge Nichols observed:

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1. On September 9, 1991, Judge Nichols issued an identical opinion dismissing the remaining three cases before him.

Appendix A

> The Court of Appeals stated that "A 'cognizable event' occurs when a patient discovers or should have discovered both the injury and the negligence." *Browning v. Burt, supra,* 12. To require discovery of both injury and negligence ignores the debate that has raged in the Supreme Court since 1983 and the resolution of that debate in favor of discovery or an injury.
>
> * * *
>
> It is obvious that Moyer, Holmes and Wright [by their concurring opinions in *Allenius*] did not want any misinterpretation of Douglas' position by which trial courts might reintroduce recognition of malpractice as the standard by which to determine a cognizable event. However, that is precisely what the court of appeals did in *Browning* when it stated that the cognizable event occurs upon discovery of both injury and negligence.

Roberts v. Burt (Sept. 5, 1991), Montgomery C.P. No. 87-636, etc. at p. 26, 33.[2]

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2. In addition to those cases already discussed, ten cases are still in common pleas court awaiting rulings on SEMC's motions for summary judgment (based primarily on the statute of limitations). Yet another case, *Phillips v. Burt* (June 21, 1991), Montgomery C.P. No. 868-1004, was recently tried to jury. After a lengthy, seven-week trial on all issues, the jury returned a verdict for SEMC on the statute of limitations. That case is currently pending in the trial court on post-trial motions filed by the plaintiff.

Appendix A

As Judge Nichols observed, the court of appeals' decision conflicts with the prior rulings of this Court. The trial courts of the Second District must now choose whether to apply this Court's precedents or those of the court of appeals. Further, as discussed below, application of the new test which this case establishes threatens to have a negative impact upon hospitals in this state.

B. Procedural Posture

Plaintiffs' Complaint was filed on April 17, 1989. (Rec. at 10). Plaintiff, Ms. Browning, alleged that Defendants Dr. James Burt and Dr. Max Blue, former members of SEMC's medical staff, performed experimental and unnecessary surgery on her without her consent. Although set forth in a single count, she asserted two separate claims against Defendant, SEMC, one for negligence in credentialling Dr. Blue and the other for negligently credentialling Dr. Burt. (Rec. at 13). Plaintiff, Mr. Browning, asserted a derivative claim against all defendants for "the loss of the society, companionship, consortium, and services" of his spouse. (Rec. at 14). SEMC and Dr. Blue filed timely Answers in which they asserted, *interalia*, the defense of the statute of limitations. (Rec. at 19, 26). Plaintiffs' motion for default judgment against Dr. Burt was granted on July 21, 1989, but such order did not determine a specific monetary recovery against Dr. Burt.

Mrs. Browning was deposed on July 19, 1989. (Rec. at 43). Subsequently, SEMC and Dr. Blue filed motions for summary judgment based on the statute of limitations. (Rec. at 30, 186). The trial court granted these motions on December 5, 1989 and February 2, 1990, respectively. (Rec. at 327, 352). Judgment entries were filed as to SEMC on January 3, 1990 and as to Dr. Blue on March 5, 1990. (Rec. at 340, 358). After a Civil Rule 54(B) certification, Plaintiffs appealed. (Rec. at 361).

Appendix A

In a decision issued August 20, 1991, the court of appeals reversed, in its entirety, the ruling of the trial court as to SEMC. (Rec. at 456). The Court of Appeals affirmed the dismissal of Ms. Browning's claims against Dr. Blue, but reinstated Mr. Browning's derivative claims.

On October 17, 1991, SEMC filed its Notice of Appeal to this Court in the court of appeals. (Rec. at 473). Dr. Blue also appealed to this Court the ruling reviving Mr. Browning's consortium claim against him. (Rec. at 472). Plaintiff did not appeal the ruling upholding the dismissal of Ms. Browning's malpractice claim against Dr. Blue and that aspect of the case is therefore final.

On January 15, 1992, this Court granted Appellants' Motion to Certify. One week later, on January 22, 1992, a similar ruling was issued in *Mitchell v. Burt,* Sup. Ct. No. 91-2121. The Court, *sua sponte,* ordered the *Browning* and *Mitchell* appeals consolidated.

II. STATEMENT OF THE FACTS

Jimmie Dean Browning underwent a number of surgeries by Dr. Blue and Burt at SEMC from 1982 to 1986. Accepting Ms. Browning's account, none of the ills or dysfunctions which the surgeries were calculated to help were cured or even improved. The old problems were aggravated, new problems appeared, and all become chronic. On February 19, 1982, Drs. Burt and Blue performed the first surgery which consisted of an exploratory laparotomy, vaginal reconstruction, circumcision of her clitoris and insertion of a urinary catheter. The vaginal reconstruction consisted of the redirection and elongation of her vagina, as well as repair of the front and back vaginal walls. According to Ms. Browning, Dr. Burt had informed her prior to her surgery that it would include measures to enhance sexual response:

> A. Well, Dr. Burt told me that they would be able to place — build a pedestal in there to put my bladder on, him and Dr. Blue to where I would be able to void better and that he might do a few cosmetics things in there to enhance my sex life.

(Rec. at 92). She also stated that Dr. Burt told her "he was going to try and fix things so that I wouldn't have trouble during intercourse." (Rec. at 128, 157).[3] Prior to that surgery, Plaintiffs

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3. Two weeks before the 1982 vaginal reconstruction surgery Ms. Browning had been advised in writing that the Executive Committe of the Medical Staff at SEMC knew about the surgery which she was about to undergo. Exhibit A to her deposition was a letter on SEMC letterhead as follows:

> Dear Patient:
>
> The Executive Committee of the Medical Staff of St. Elizabeth Medical Center wishes to inform you that the "female coital area reconstruction" surgery you are about to undergo is:
>
> 1. Not documented by ordinary standards of scientific reporting and publication.
>
> 2. Not a generally accepted procedure.
>
> 3. As yet not duplicated by other investigators.
>
> 4. Detailed only in non-scientific literature.
>
> You should be informed that the Executive Committee of the Medical Staff considers the aforementioned procedure an unproven, non-standard practice of gynecology.

(Cont'd)

Appendix A

only medical problems were bladder problems and painful sexual intercourse. (Rec. at 88, 93, 157). Ms. Browning testified that she developed a myriad of unusual and exacerbated symptoms following her surgery on February 19, 1982. She experienced worsened bladder problems (including problems with incontinence and obstruction of urine flow) and worsened sexual problems, as well as newly-developed kidney problems (including severe infections and bleeding), vaginal pain, and bowel problems. (Rec. at 89-91, 96-99, 118, 130-134). She also had to employ an indwelling urinary catheter for six months following her surgery. (Rec. at 130). After the catheter was removed, Ms. Browning became aware of these numerous problems. As she stated "when he took the catheter out [in 1982] and I couldn't go is when I became aware of I had problems then." (Rec. at 99). At that time she realized that she "should have been able to go on my own without any problems but I wasn't," and that she "wasn't able to void like I should." (Rec. at 130-131). She recognized that this problem with voiding was different from her urinary problems with voiding

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(Cont'd)

/s/ Jimmie Dean Browning
Patient's Signature
/s/ Vivian A. Helbling
Witness

2-5-82
Date

The original of this letter, which bears Ms. Browning's witnessed signature, is a part of her hospital record from the February, 1982 surgery. It bears an addressograph print of her name and Dr. Burt's in the upper right, just as the other pages of the hospital record. Thus, examination of her hospital record at any time since 1982 would have reminded Plaintiff or her counsel of the facts stated in the letter. One of her claims later pled against SEMC, was that it had negligently and knowingly permitted Burt to perform experimental surgery on her. Complaint Paragraph 15(b).

before the 1982 surgery. (Rec. at 131-132). The incontinence she began suffering immediately after the removal of the catheter was a problem she had never experienced in her adult life. (Rec. at 131-132). She also began experiencing new and distinct sexual problems which, according to Ms. Browning, Dr. Burt told her she should not be having. (Rec. at 133). These problems became evident several weeks after her surgery when Plaintiffs attempted to have sex but could not because Ms. Browning "wasn't healed up in there like I should have been." (Rec. at 133). She knew that her sexual relationship with her husband "wasn't normal" after the 1982 surgery because her "husband had trouble penetrating. It seemed like it was too small in there. It caused me an awful lot of pain." (Rec. at 134). These sexual problems have not "healed up," but have drastically reduced Plaintiffs' sexual activity, as evidenced by the fact that, during one of the years following her surgery, they had sex only twice. (Rec. at 99).

Ms. Browning stopped seeing Dr. Burt in 1983. (Rec. at 86, 115). She discontinued her treatment with him because "he wasn't doing me any good." (Rec. at 135).

Ms. Browning subsequently underwent a number of additional surgeries performed by Dr. Blue. The final surgery, on August 23, 1986, involved removal of one of her kidneys. (Rec. at 55). She has not been treated by Dr. Blue since August of 1987, and has not been hospitalized at SEMC since September of that year. (Rec. at 69, 81, 113).

According to Ms. Browning, the subsequent surgical treatments by Dr. Blue did not improve either her problems which developed following her February 1982 surgery or her pre-existing bladder problems. In fact, she stated that her problems worsened following her surgical treatment by Dr. Blue in 1986, and that she

developed right flank pain and "an awful lot of swelling" in her back after her 1986 surgery. (Rec. at 57, 64-65, 67, 89, 99).

Ms. Browning began to investigate her concern as to Dr. Blue's treatment of her when, in June of 1987, she went to the Cleveland Clinic. According to Ms. Browning:

> I went up there about my kidney, you know, to make sure — you know, why I was having all the trouble after my kidney was removed is why I went . . . .

(Rec. at 60). She went so far as to tell that physician that she "thought something was wrong, you know, from the surgery I'd had, that I didn't get over it and when he took my kidney out, I thought I wouldn't have any more problems." (Rec. at 62-63, 71, 103). According to Ms. Browning, the Cleveland Clinic physician told Dr. Blue and wrote in a letter that there had been a "flaw" in her surgery, but she never investigated the specific nature of that "flaw." (Rec. at 62, 105).

Just after that 1987 visit to the Cleveland Clinic, Ms. Browning confronted Dr. Blue as to her belief "that he had done a *malpractice operation* on [her] because [she] was not getting well." (Rec. at 59). (emphasis added). During her encounter with Dr. Blue, she "asked him why I had been through all the surgeries and been in the hospital so many times if there wasn't nothing wrong with me and every time he told me I was going to be just fine that time." (Rec. at 83).

Ms. Browning also complained to Dr. Blue at the time (1987) about Dr. Burt because "I became incontinent after I had that [1982] surgery done." (Rec. at 85). Ms. Browning also told Dr.

Blue at that time Dr. Burt had allegedly told her earlier in 1982 or 1983 that "half of the surgeries that I had had done on me were malpractice." (Rec. at 85, 86).

Ms. Browning again accused Dr. Blue of having committed malpractice on her, asserting that he was a "liar," in August of 1987. (Rec. at 77-78). Ms. Browning also told her psychiatrist in 1987 that she hated Dr. Blue because she "felt like he had ruined my life" because "after my kidney was removed, I still wasn't well and I'll never be well.' (Rec. at 106). She had continued, since August of 1987, to think that Dr. Blue committed malpractice on her:

> Q. Did you have any other occasions to tell Dr. Blue that he was either a liar or that he committed malpractice on you after August of 1987?
>
> A. Well, *I though that ever since.*
>
> Q. I understand that you've thought that ever since and by that, you're talking about that he committed malpractice on you?
>
> A. Yes sir.

(Rec. at 78). (emphasis added).

By Decision and Order entered December 5, 1989, the trial court dismissed Plaintiffs' claims against SEMC as barred by the statute of limitations. (Appendix at 21a). Noting that "Plaintiff's deposition . . . is replete with indications that Plaintiff knew something was wrong," the trial court found that Plaintiffs' claims

accrued, at the latest, in August, 1987. (Appendix at 23a, 25a). Plaintiffs' action, which was brought a year and eight months thereafter, was accordingly deemed untimely under R.C. § 2305.11. (Appendix 25a, 26a). On February 2, 1990, the trial court issued a similar ruling dismissing Plaintiffs' claims against Dr. Blue. (Appendix at 27a).

The court of appeals, on August 20, 1991, affirmed the summary judgment dismissing Ms. Browning's claims against Dr. Blue, but reversed the trial court's grant of summary judgment in favor of SEMC.[4] The court found that, under *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131, Ms. Browning's claim against Dr. Blue occured in 1987. (Appendix at 14a). Since Plaintiffs did not file suit until April of 1989, the court agreed that Ms. Browning's action against Dr. Blue was barred by the malpractice statute of limitations, R.C. § 2305.11 (B)(1). (Appendix at 14a-15a).

Despite the foregoing finding, the court of appeals ruled that Ms. Browning's action against SEMC was not barred by the statute of limitations. To achieve this result, the court of appeals revived an old and disapproved "cognizable event" analysis against SEMC:

> A "cognizable event" occurs when a patient discovers or should have discovered both the injury and the negligence. *Allenius, supra.*
>
> The critical inquiry is *when* should the appellant have had reason to believe that St. Elizabeth Hospital had failed to provide

4. The court also reinstated Mr. Browning's derivative claims against Dr. Blue.

> adequate supervision or review of Drs. Burt and Blue? There is no evidence before the Court that the appellant knew or should have known that the hospital had failed to perform its legal duty toward her until she saw the West 57th Street television show in late 1988. Appellant filed her lawsuit against the hospital within six months of viewing that program. The trial court improperly granted summary judgment in favor of the hospital.

(Appendix at 16a-17a).

This position adopted by the Court of Appeals was *never* briefed, argued, discussed or even alluded to by any of the parties. To the contrary, the parties implicitly agreed that an event triggering the statute of limitations as to the Defendant physicians would also begin the statute running as to SEMC. The only dispute between the parties was over just what Plaintiffs had to "discover" — the malpractice of the physicians (as Plaintiffs maintained) or Ms. Browning's injuries (as Defendants argued).

The court of appeals' ruling here conflicts with this Court's decisions in *Richards v. St. Thomas Hospital* (1986), 24 Ohio St. 3d 27, *Hershberger v. Akron City Hospital* (1987), 34 Ohio St. 3d 1, and *Allenius, supra,* and would revive the debate lately settled by this Court whether discovery of the malpractice (or negligence) is required. Moreover, the test adopted by the court of appeals would effectively eliminate the statute of limitations for hospitals sued on claims of negligent credentialling. It rewards plaintiffs who exercise little or no diligence in investigating their potential claims and promises to burden hospitals with litigations decades after the treatment complained of and long after the primary claims against

the physicians have expired.[5] The precedents of this Court, as well as public policy considerations mandate reversal.

III. ARGUMENT

Proposition of Law No. 1:

For a Medical Claim Of Hospital Negligence To Accrue For The Purpose Of The Statute Of Limitations, It Need Not Be That The Patient Knows Or Should Know That The Hospital Has Been Negligent. It Is Enough That Events Cognizable To The Patient Do Or Should Alert The Patient Of The Need To Investigate A Potential Claim For A Medical Condition Which The Patient Does Or Should Relate To Care Received At The Hospital.

A. The New "Discovery Rule" Adopted by the Court of Appeals is in Direct Conflict With The Previous Decisions of This Court

In resurrecting Plaintiffs' claims against SEMC, the court of appeals neglected both the letter and spirit of this court's pronouncements on the discovery rule in medical cases. In addition to requiring discovery of the injury, the court of appeals held that a cause of action for malpractice against a hospital does not accrue until the patient is (or should be) aware of (1) the legal duty owed to her by the hospital as regards credentialling of physicians; and (2)

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5. This litigation is illustrative of this point. Of the forty-four cases pending, twenty-nine involve suits brought ten years or more after Plaintiff's surgical or medical treatment by Dr. Burt. Seven suits date back nearly twenty years.

the hospital's breach of that duty. (Appendix at 16a-17a). This test goes far beyond the discovery rule established by this Court in *Oliver v. Kaiser Community Health Foundation* (1983), 5 Ohio St. 3d 111 and is progeny and adopts a standard explicitly rejected by this Court just two years ago

In *Oliver* this Court held that, "Under R.C. § 2305.11(A), a cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury." *Id.* at 111. The question subsequently arose whether discovery of the negligence (malpractice) had to occur for such a claim to accrue. This Court has repeatedly and resoundingly answered this question in the negative.

In *Richards v. St. Thomas Hospital* (1986), 24 Ohio St. 3d 27, plaintiff underwent surgery in 1975 for a herniated disc and thereafter never regained movement in his legs. He never asked a doctor about the treatment he received at St. Thomas Hospital, nor did he seek legal advice until after November of 1982. He commenced an action for medical malpractice on October 7,1983. This Court ruled that plaintiff's action accrued upon discovery of the injury and was barred by the statute of limitations:

> In *Oliver*, we observed that one purpose of the "discovery rule" was to afford "relief in cases where the injury is one which requires a long developmental period before becoming dangerous and discoverable" . . . Thus, *Oliver* does not rely exclusively on the patient's actual discovery of the malpractice alleged; rather, the cause of action accrues when the physical injury complained of is or should have been discovered by the patient.

Chief Justice Celebreeze dissented, arguing that a cause of action should not accrue until Richards discovered both the injury and the hospital's responsibility for it. Id. at 31-32. Shortly thereafter, the Court, in *Hoffman v. Davidson* (1987), 31 Ohio St. 3d 60, followed the *Richards* rationale, finding that the statute of limitations began to run when the plaintiff discovered her physical injury.

The Court revisited and thoroughly analyzed this issue in *Hershberger v. Akron City Hospital* (1987), 34 Ohio St. 3d 1. In *Hershberger*, the Court reviewed four methods used in other jurisdictions to define accrual of malpractice claims and specifically adopted the third approach as used in *Graham v. Hanson* (1982), 128 Cal. App. 3d 965, and in *McGee v. Weinberg* (1979), 97 Cal. App. 3d 791, 804. In this process, the *Hershberger* Court specifically rejected the method using discovery by the patient of a "legal injury" or of malpractice for defining accrual. The Court noted significant problems with such a test:

> [T]o utilize "legal injury" might effectuate a complete undermining of the discovery rule since anyone could allege ignorance of his legal rights. It would also be most difficult to refute such an allegation, whether or not true, without proceeding to full trial. An issue of fact could be compounded unless objective proof, which would ordinarily not be available, could sufficiently infer such subjective knowledge or belief. It is therefore knowledge, actual or inferable, of *facts*, not legal theories which initiates the running of the one-year statute of limitations.

Id. at 4-5

Appendix A

The entire point of this Court's opinion in *Hershberger* was to resolve the uncertainty created in *Oliver* and Supreme Court cases subsequent thereto, which alternatively discussed the plaintiff's discovery of "injury," "physical injury complained of," "resulting injury" or "malpractice," as if these terms were synonymous. 34 Ohio St. 3d at 3, 4. *Hershberger* makes clear that such terms are not interchangeable and that discovery of "legal injury" is not required before the statute of limitations begins to run.

In *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131, the Court again reaffirmed that accrual does not require discovery of the negligence/malpractice. The *Allenius* Court refined the test announced in *Hershberger* and laid down what is now the law for accrual of a medical malpractice claim:

> [A cause of action accrues when there is] an occurrence of a "cognizable event" which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.

Id. at 133. The Court rejected the *Allenius* plaintiff's position that the statute was triggered only when she was informed of the malpractice. *Id.* at 132, 134. The decision of the Franklin County Court of Appeals which this Court reviewed in *Allenius* found that the period of limitation "began to run when '* * * the plaintiff is aware or should be aware of the event which caused the injury and aware of the nature of the injury as a legal wrong. * * *' " 42 Ohio St. 3d at 132. The decision of the court of appeals in this case is

substantially identical to that of the court of appeals in Allenius.[6]

Concurring opinions were authored in *Allenius* by the Chief Justice and Justice Holmes in order to emphasize the intent and significance of the "cognizable event" test the Court was adopting:

> [I]n determining when the statute of limitations is triggered, " '[t]he test is whether the Plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation.' . . ." As indicated by the majority, it is a cognizable event such as the occurence of pain or injury "* * **rather than knowledge of its legal significance* that starts the running of the statute of limitations." (Moyer C.J.)
>
> [A] cognizable event involves pain or some other physical indicium, rather than knowledge of the legal significance of such pain . . . . (Holmes, J.).

Id. at 135 (emphasis added, citations omitted).

Every tort lawsuit has its genesis with the future plaintiff reflecting on whatever misfortune has befallen him or her and asking a few standard questions: "Was this harm that happened to me avoidable? Is it someone's fault that it happened? Whose fault is it?" The problem in determining accrual dates for the medical

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6. The court of appeals in *Allenius* rendered its decision before this court's December, 1987, ruling in *Hershberger*.

claim statute of limitation has always been to say just how grave, surprising, incongruous and suggestive of fault, an untoward medical outcome must be before the "reasonable person" would presumably be moved to inquire into his or her rights. The kinds of circumstances which could meet this threshold of suspicion can be described, but not defined, because the potential variations are unlimited. The important distinction is that it is such circumstances which would prompt a reasonable person *to inquire* into his rights, *not* circumstance which would compel a given conclusion to that inquiry, which will set off the statute of limitation.

There are some situations in which all would agree that the circumstances would compel a reasonable person to ask the "fault questions" which spawn every tort action. The simplest and perhaps most concise characterization of these limitation-triggering circumstances was quoted in *Hershberger*: "* * *[F]acts and events which inform a person that something is wrong, or *should be looked into* . . ." 34 Ohio St. 3d at 5 (emphasis added), quoting *McGee v. Weinberg* (1979), 97 Cal. App. 3d 798, 804, 155 Cal. Rptr. 86, 90. If an airplane has crashed into a house or a person has been struck by a car while walking on a city sidewalk, no one would debate that my statutory period to sue for damages for that harm begins to run at the time of injury. Someone may be liable — or no one — but the circumstances of the injury compel the person to investigate, reach conclusions on fault and liability, and sue, if he or she chooses to, all within the period of limitation. There are also situations at the other end of the continuum, in which all would agree that no reasonable person would consider that he or she might have a grievance against another. If a surgical sponge is left behind in the incision and this situation produces no symptoms or signs for many years, no such patient could or would investigate his or her legal rights agains the surgeon during that interval. This scenario, which itself was the factual setting for the formulation of

the "discovery rule," bears no similarity to this case, in which an operation designed to solve a problem, made it much worse and precipitated new problems.

Nothing in the court of appeals' decision would logically limit its application to medical claims or claims against hospitals. If a plaintiff's inaction and passive ignorance of the details of a defendant's specific negligence tolls the statute of limitations for medical claims, why not for all other negligence claims? The variety of situations in which investigation is necessary before a would-be plaintiff can discover all potential defendants and all theories of liability is broad indeed.

Often one who knows (or should suspect) that he or she has an actionable claim must investigate the facts and/or law to identify his potential defendants and/or theories of recovery. This investigation may be as simple as exchanging names and addresses with the other driver at the scene of an automobile accident. It may, less often, require assessment of technical data and consultation with experts. Whichever the situation, it has never, until now, been Ohio's law that dilatory plaintiff was priviliged to forego investigation of his own rights, though possessed of good cause to suspect that his injuiry was someone's fault, and to wait for his lawyer and his case to find him. Neither has a defendant been obliged to make a case for his own negligence and then prove that the plaintiff should have sooner seen that negligence, even without investigation or initiative, before that defendant could benefit from a statute of limitations. The court of appeals' ruling, however, embodies both these propositions.

Ms. Browning was clearly aware of her injuries and the need to investigate her possible remedies well more than a year before she filed suit. The court of appeals, in fact, so found and thereby

affirmed the dismissal of Ms. Browning's claim against Dr. Blue. This ruling should have also disposed of Ms. Browning's claim against SEMC. (After all, she knew from the start that her surgeries were performed at SEMC.) Instead, the court of appeals applied a far different, much more extreme discovery rule against SEMC (while presuming to utilize the same statute of limitations and case law interpreting it). That new test (requiring awareness of both the legal duty owed to the patient and of the negligence committed before accrual occurs) conflicts with this Court's holding in *Richards*, *Hoffman*, *Hershberger* and *Allenius*. Accordingly, the court of appeals' ruling below must be reversed and the trial court's decision reinstated.

B. A Plaintiff Has A Duty To Investigate All Potential Claims And May Not Sit Idly By Until Coincidence Brings A Cause Of Action To Her Attention

The court of appeals' decision below eliminates any requirement for a plaintiff to investigate possible remedies — even though she knows of her injuries and does or should suspect that they were caused by the negligence of another. That ruling is contract to Ohio law and public policy.

The court of appeals conceded that Ms. Browning knew of her injuries, connected them to her medical treatment, and believed they were due to medical negligence in August of 1987, if not earlier. (Appendix at 14a). Despite this awareness, Ms. Browning did not pursue her possible remedies against her physicians, SEMC, or other health care providers until April 17, 1989, when she filed this action. On the basis of these facts, the court properly found that Ms. Browning's claims against her treating physician, Dr. Blue, were barred by the statute of limitations. However, the court, rewarded Ms. Browning for her lack of diligence, holding that her claim against SEMC for the same injuries was not barred.

That claim was deemed to have accrued, if at all, in October of 1988, when Ms. Browning, by coincidence, saw a television program about Dr. Burt. (Appendix at 17a). In so ruling, the court discounted the plaintiffs' duty to investigate potential claims and created a standard that may have far-reaching, grossly inappropriate results.

This Court's decision in *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131 suggests that a claim against a hospital for negligently credentialling a physician must accrue (at the latest) at the same time as the malpractice action against that physician — specifically because of plaintiffs' duty to investigate potential claims. In *Allenius*, this Court established the test for determining when a malpractice claim accrues for purposes of the statute of limitations set forth in R.C. § 2305.11, holding that there must be:

> [A]n occurrence of a "cognizable event" which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.

Id. at 133. The foregoing is instructive. It emphasizes the need to pursue *possible* remedies and does not restrict the patient's responsibility to pursuing only claims against the physician. Rather, *Allenius* clearly envisions and requires that the patient investigate and pursue all possible remedies once she has been put on notice by the cognizable event. Among these *possible* remedies are claims against the physician or physicians for malpractice, claims against the nurses for improper care, claims against the

hospital for the actions or omissions of its employees involved in the patient's care, *and* claims against the hospital for negligence in the credentialling and retention of the staff physician treating the patient.

Courts in analogous situations have concluded that accrual of an action against one or more defendants also begins the statute of limitations running as to all potential defendants who are or should be discovered. In *Bales v. University of Cincinnati* (July 25, 1991), Ky. Ct. App. Nos. 90CA-1751-MR and 90CA-1822-MR, (Appendix at 103a) plaintiff underwent bladder repair surgery at Humana Hospital — Lake Cumberland, Kentucky. During the surgery her left ureter was inadvertently severed and several days later she was transported by helicopter to the University of Cincinnati Hospital ("U.C. Hospital"). The treatment rendered en route apparently led to a gangrenous condition, causing her to lose portions of her fingers, feet and toes. Within a year (the period of limitations in Kentucky for a negligence or malpractice claim against a physician or hospital), she brought suit against Humana Hospital and her Kentucky physicians. She did not sue U.C. Hospital at that time. Six months later, plaintiffs counsel deposed one of the Kentucky physicians, Dr. Kennedy. Dr. Kennedy placed blame for the plaintiff's injuries upon the treatment of the U.C. Hospital Air Care Unit. On the basis of that testimony, plaintiff filed a new suit on November 29, 1989, naming as defendants the Kentucky health care providers and U.C. Hospital. U.C. Hospital moved for summary judgment, asserting that plaintiff's action was barred by the Kentucky one-year statute of limitations. The trial court granted the motion and plaintiff appealed. The court of appeals affirmed the dismissal of plaintiff's claims against U.C. Hospital, emphasizing that it was plaintiff's obligation to investigate her claims against all potential defendants and bring suit against any of them she wished to within the statutory one-year period:

> Mrs. Bales contends that there existed a genuine issue of material fact as to when she discovered or reasonably should have discovered that she had been injured by U.C., precluding summary judgment .... We disagree....
>
> [T]his is not a case where Mrs. Bales has no way of determining who the negligent parties are, nor is it a latent disease case in which the symptoms do not manifest themselves until long after the exposure or injury. Mrs. Bales complains of injury during the bladder repair surgery itself and the subsequent injury to her extremities from lack of circulation. This subsequent injury became apparent in January, 1988 and Mrs. Bales knew at that time that her injuries, of whatever nature, were caused by the Kentucky defendants or U.C. or a combination thereof. *She had the opportunity and responsibility to have the medical records evaluated so that proper parties could be sued, or she risked being forever barred from making a claim against unnamed persons or entities. We agree with the trial court that the law allowed her one year from early January, 1988 "to determine which of the potential defendants to sue."*

Slip op. at pp. 4-6 (emphasis added and citations omitted).

In *Urchel v. Holy Cross Hospital* (1980), 82 Ill. App. 3d 1050, 403 N.E.2d 545, plaintiff sustained a fractured neck in 1973 in a

vehicular collision. He was taken to the emergency room at Holy Cross Hospital. Upon his discharge, he was a quadriplegic. A 1973 action against the transit association was settled in 1976. In 1977, the plaintiff sued the hospital where he was treated, claiming failure to timely diagnose and treat his condition and aggravation of his initial injuries. Plaintiff further alleged that he first learned of defendant-hospital's alleged liability in 1976 when he heard deposition testimony about the same bus accident. That witness had testified that she saw the plaintiff sitting up in the hospital emergency room. The defendant-hospital asserted the statute of limitations as a defense and the court granted the defendant's motion to dismiss. In affirming, the court of appeals wrote:

> Beginning with the time the plaintiff was injured and became aware of the possibility that someone was at fault, he was subject to constructive knowledge of the normal two year statute of limitations within which a suit for medical malpractice must be brought. During this period of time the plaintiff should have thoroughly investigated the circumstances of the accident and events occurring subsequent thereto to determine not only the facts necessary to his suit against the [transit association] but, in addition, to determine whether any other parties might have been at fault. The plaintiff had an opportunity to know he had a cause of action.

Id. at 547. *In accord, Lebrecht v. Tuli* (1985), 130 Ill App. 3d 457, 473 N.E. 2d 1322, 1344. (Where in rejecting the contention that discovery occurred at different times in a malpractice action against a physician, hospital and clinic, the court stated: "[O]nce

Plaintiff is on notice as to one Defendant's negligence, she has a duty to inquire about other potentially negligent parties.",

The importance of plaintiffs' duty to investigate was also emphasized in *Kroes v. Harryman* (1958), 352 Mich. 642, 90 N.W. 2d 444. In *Kroes*, the plaintiff was burned when a bottle exploded near her at the doctor's office where she worked. Plaintiff timely commenced suit against the doctor, but did not file an action against the pharmacy which supplied the bottle until the statute of limitations had run. Plaintiff attempted to avoid the foreclosure of her action by arguing that the defendant-doctor concealed the identity of anyone else who might have been made a party and that she had "just recently" learned that the defendant-pharmacy supplied the liquid. The Court rejected this argument, stating:

> [N]o inquiry or investigation was made by the plaintiffs or their attorney as to the possible liability in this case of any other person than the defendant (doctor). No questions were asked of [the doctor], and it is obvious that had the question been asked it would have been answered. . .
>
> The statute was not designed to help those who negligently refrain from prosecuting inquiries plainly suggested by facts known, and the plaintiff must be held chargeable with knowledge of the facts, which it ought, in the exercise of reasonable diligence, to have discovered. It does not seem to me that litigants should be permitted to allow the statute to expire, make no attempt whatever to determine who might or might not be liable, and then have

> the statute extended by merely claiming that someone concealed the identity of a party or a cause of action when it is obvious that they made no effort whatever to find out for themselves.

Id. at 447.

A lower court of this state has also pointed out the importance of requiring a plaintiff to investigate all of her potential claims. In *Hervey v. Normandy Development Co.* (March 16, 1990), Ashtabula Ct. App. No. 89-A-1433 (Appendix at 43a), unreported, mot. to cert. overruled (1990), 52 Ohio St. 3d 708, plaintiff sued a mobile home manufacturer over injuries she sustained from fromaldehyde emissions within the home. She discovered her injuries and the possible connection with formaldehyde emissions in August of 1982. Although plaintiff filed her action in January of 1983, she did not attempt to bring the supplier of the mobile home's flooring (a source of the formaldehyde) into the action until February of 1986. In opposition to a motion for summary judgment on behalf of the flooring supplier, plaintiff argued that the statute of limitations did not begin to run until she had discovered the identity of the defendant. The trial court granted summary judgment. In affirming that ruling, the court of appeals stated:

> "... Under the 'discovery rule' in Ohio, an injured party has two years from discovering the injury to file a claim against the party liable. *That two-year period is provided so that the injured party has ample time to identify responsible parties and to evaluate his legal claim.* Prejudice to the defendants would be enormous if claims could be filed against them

> five or ten years after an incident occurred. Evidence would be lost and memories clouded, not to mention the disastrous effect on the liability insurance system. In short, if the legislature had intended to allow the delaying of filing a claim until all liable parties could be identified, they would have included such a provision in the statute."
>
> * * *
>
> Under the facts of this case, the policy reasons which underlie statutes of limitations would be frustrated by appellant's argument. Within the framework of the facts herein, appellant cannot simply disclaim knowledge of appellee Champion's identity and let the statute of limitations languish until appellant's discovery of the identity by means which she chooses to use.

Id. at pp. 2, 4 (emphasis added).

The foregoing points are of particular force here. Twenty-nine (29) of the forty-four (44) pending cases are suits brought ten years or more after the surgical procedures in question. In at least fourteen of the cases (including Browning) important records — those of Dr. Burt — have apparently been lost and are no longer available.

The test developed by the court of appeals below clearly encourages the bringing of such state claims. Under this new standard, accrual is so greatly divorced from pain and injury —

signs that a lay person can understand and act upon — that "discovery" will never occur, excepting sheer coincidence. Here, for example, the only evidence which the court of appeals held might establish "discovery" was Ms. Browning's acknowledgement that in October of 1988 she had watched a television program about Dr. Burt. (Appendix at 13a). Yet, if Ms. Browning had denied seeing the program (whether she had or not) or if the case were of less notoriety and not subject to extensive media attention, discovery would not have occurred at that time (and perhaps not for years or decades thereafter, if ever). Thus, the new test applied below also leaves the defendant-hospital completely at the mercy of the plaintiff's admissions, effectively eliminating the objective prong of the discovery rule.[7]

The instant case demonstrates the uncertainty and limitless impact of the court of appeals' new discovery rule. Although Plaintiffs have mixed them together, they assert here two separate claims against SEMC for negligent credentialling: one as to Dr. Burt and the other as to Dr. Blue. The *West 57th Street* program, and the adverse publicity which followed, was directed almost entirely at Dr. Burt. Little, if any, information pertinent to the credentialling of Dr. Blue was publicized. Although a massive amount of discovery has been conducted in this litigation, the discovery regarding Dr. Blue has been minimal. It is therefore doubtful that plaintiffs, even now, have been exposed to media or other sources of information apprising them of negligent peer review or a "pattern of incompetence" regarding Dr. Blue. Thus, under the test established below, Plaintiffs' action against SEMC for the

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7. It is doubtful that a defendant could successfully argue that a plaintiff *should have* seen a particular TV program or read a particular magazine or newspaper article (or otherwise should have been exposed to a coincidental event making her aware of the hospital's alleged negligence.

negligent credentialling of Dr. Blue, although now pending for nearly three years, probably has yet to accrue!

The instant case demonstrates the dramatic impact of the ruling below: it effectively eliminates the statute of limitations as a defense for a hospital sued on a claim of negligent credentialling. Interestingly enough, this impact is greatest upon the non-negligent defendant, since evidence of negligence is obviously less likely to come to a potential plaintiff's attention where there has been no negligence. Accordingly, the non-negligent defendant is particularly likely to be subject to suit on such claims forever and may be forced to fully defend them on the merits[8] decades after the facts giving rise to the action (even though the plaintiff's malpractice claim against her physician may have expired many years earlier).[9]

The ruling below is also likely to foster unwarranted litigation against hospitals. Plaintiffs who have failed to diligently pursue claims against their physicians and find them barred by the statute of limitations will look to hospitals and negligent credentialling claims as a means to salvage something. Large payouts to undeserving claimants may result simply because the costs of defending on the merits are substantial.

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8. This is a very difficult claim for a hospital to defend because of the servere restrictions upon the evidence which may be used. R.C. §§ 2305.25 and 2305.251 prohibit introduction into evidence of any of the matters considered or actions taken by hospital credentialling committees.

9. This litigation, again, is illustrative of the point. In most of these cases, plaintiffs' actions against Dr. Burt accrued shortly after their surgeries ten (and more) years ago. Their suits for malpractice against him accordingly expire nine (or more) years ago. The test established below nevertheless allows these suits against SEMC.

Another incongruity of the standard adopted by the court of appeals is that it would suspend operation of the statute of limitation even where a patient has suspected malpractice, investigated his or her rights and concluded that there was no negligence. Only the hospital which was *prima facia* negligence would have the benefit of the statute of limitation at all and even it only after the evidence of its negligence had come to the patient's attention by happenstance.

Finally, the drastic extension of the statute of limitations which will result from the decision below is likely to put hospitals at an unfair and inappropriate disadvantage in defending such cases. One defense to a negligent credentialling claim is that there was no malpractice on the part of the physician in question (or that the departure from the standard of care did not cause the alleged injuries). Many years after the fact this may be difficult to prove,[10]

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10. In *Richardson v. Doe* (1964), 176 Ohio St. 370, 372, this Court emphasized the importance of requiring medical malpractice actions to be brought promptly:

> With the passage of time, it becomes more and more difficult for a physician to establish that he exercised due care in performing his services. If sufficient time passes, it may be impossible to determine whether the present physical condition of a person is the result of a lack of care and skillin prior treatment or the result of factors unrelated to treatment.
>
> Because of the possibility of unwarranted and fraudulent claims which would be difficult to disprove, the General Assembly in 1984 amended the one year statute of limitations, Section 4983 Revised Statutes (Section 2305.11 Revised Code), to include actions for malpractice. 91 Ohio Laws 299.

especially if the physician is no longer around or does not want to get involved. That physician (the party best able to defend the malpractice claim), shielded by the statute of limitations, may choose to avoid the process altogether. Thus, the hospital is left to defend that aspect of the case alone, without the participation of the physician and likely without benefit of critical records that have been lost or destroyed years before.

In short, the decision below threatens to have a multitude of untoward effects. It eliminates the duty of a plaintiff to investigate possible claims and, thus, leaves hospitals and other potential defendants (except for the primary physician) open to litigation for many, many years after the facts giving rise to the cause of action. Potential defendants who have not been negligent, in particular, will likely be completely deprived of the benefits of the statute of limitations. Further, there is no logical reason to believe the Second District will limit this ruling to hospitals and negligent credentialling claims. If extended, the decision below may effectively eliminate the statute of limitations in all but the most clear cut of cases.[11]

Ms. Browning was aware of her condition, related it to her

11. Even in outwardly simple cases, one can conceive of new causes of action coming to light years after the facts giving rise to the suit. Take, for example, an automobile accident at an intersection. Presumably, the parties driving the vehicles are immediately put on notice of the need to pursue claims against each other. However, five years later one of the parties learns that the other driver was employed and acting in the course of business at the time of the accident. Can that party then sue the employer? Ten years later that same party reads in the newspaper that there has been other accidents at the same location and surmises that the intersection may have been negligently maintained. Should he or she be able to then sue the municipality responsible for maintaining the intersection? The possibilities are endless and so may be the litigation arising from a particular set of facts.

medical care and treatment, and was on notice to pursue her possible remedies in August of 1987, if not earlier.[12] At that time (or before)[13] it became her responsibility to investigate her potential claims and to sue all medical Defendants including SEMC, within one year. This she failed to do and, accordingly, her claims against SEMC must be deemed barred by the statute of limitations.

C. Plaintiffs' Claims Against SEMC Were Discoverable Upon Proper Investigation.

Plaintiffs are expected to argue that, even if they had exercised due diligence, they could not have discovered their claims against SEMC until the *West 57th Street* television program revealed the Hospital's alleged negligence peer review in October of 1988 (because of the confidentiality afforded the process by R.C. §§ 2305.25 and 2305.251). If this is so, how did other Plaintiffs come to file their suits against Dr. Burt and SEMC before the *West 57th Street* television program? The answer is simple: they enlisted attorneys and investigated their potential claims.

The bulk of information upon which Plaintiffs rely in bringing their claim was readily available to them upon proper investigation. For example, one of Plaintiff's negligence claims against SEMC comes almost directly from the consent form contained in Ms. Browning's hospital records. *See* Section D below. Thus, had Plaintiffs taken the very elementary step of obtaining their medical records, they would have immediately

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12. The unchallenged ruling of the court of appeals upholding the dismissal of Ms. Browning's claim against Dr. Blue establishes this.

13. As discussed below, the record shows that Plaintiffs' claims relating to Dr. Burt accrued much earlier that this — in 1982 or 1983.

been alerted to at least some of the negligence claims they now assert.

Similarly, nothing prevented Plaintiffs from investigating whether Dr. Burt had previously been sued for malpractice (or SEMC sued regarding Dr. Burt). Such information was readily available at the county courthouse. It would have identified other patients who were allegedly malpracticed (i.e., perhaps indicating a pattern of incompetence) and attorneys who had accumulated information about the competency of the physician in question. The Montgomery County Medical Society and State Medical Board could have been contacted.

The book authored by Dr. Burt, upon which Plaintiffs greatly rely, was publicly available.

Plaintiffs could have conferred with treating physicians or consulted experts regarding Dr. Burt's surgery. The literature and popular press were yet additional sources of evidence available to the prudent patient acting to investigate her claims. The fact that peer review processes are confidential under Ohio law simply has no bearing on a Plaintiff's duty to investigate her possible remedies. As indicated, there are many sources open to Plantiffs investigating potential claims of negligent credentialling. The matters considered, actions taken, and records maintained by hospital peer review committees cannot be discovered, even if the Plaintiffs file suit and seek to compel the production of such evidence.[14]

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14. In turn, a hospital cannot introduce any of these matters in defending a negligent credentialling claim. This highlights a significant conflict between the legislature's mandate of absolute confidentiality in peer review proceedings and this Court's dicta in *Albain v. Flower Hospital* (1990), 50 Ohio St. 3d 251, 258-259, indicating a hospital may be liable for the negligence of its peer review committees. If

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Clearly, Plaintiffs had avenues available to them to investigate their potential claims against SEMC. Instead, they took no action. Their extreme delay in bringing suit and utter failure, for years, to pursue their rights justifies the trial court's dismissal of their action.

D. The Record Warranted Summary Judgment For SEMC, Even Under The Erroneous Legal Standard Which The Court Of Appeals Employed.

Because the court of appeals formulated its legal standard *sua sponte* and without legal or factual argument from the parties, it overlooked the fact that Ms. Browning had full knowledge since 1982 of the facts of one of the claims she asserted against SEMC. If she forgot such facts, a review of her hospital record would have provided clear and conspicuous written evidence of them, evidence placed in the record at SEMC's instance.

The court of appeals' opinion includes the assertion: "There is no evidence before this court that the appellant knew or should have known that the hospital had failed to perform its legal duty toward her until she saw the West 57th Street television show in late 1988." This observation overlooks what the records show —

(Cont'd

applied, the *Albain* dicta allows a hospital to be held liable for negligent peer review. R.C. §§ 2305.25 and 2305.251, however, prevent the hospital from defending itself, since it may introduce no evidence as to the matters brought to the attention of its peer review committees or the actions taken by those committees. These prohibitions, when coupled with potential liability, constitutes a violation of due process. The legislature recognized this potential conflict and, in 1987, amended R.C. § 2305.25 to provide immunity to hospitals for the "acts, omissions, [and] decisions" of peer review committees. This immunity constitutes another basis for upholding the trial court's dismissal of Plaintiffs' claims against SEMC.

that Plaintiff was aware of at least one of the alleged misdeeds of SEMC as asserted in her complaint, at the time her first surgery was performed. Plaintiffs' complaint read, in pertinent part:

> 15. Defendant, St. Elizabeth Medical Center negligently, intentionally, willfully, and wantonly acted to cause injury and damages to the Plaintiff by:
>
> * * *
>
> b. negligently and knowingly permitted James Burt, M.D. to perform experimental surgery upon the genital and reproductive organs of females, including the Plaintiff. . . .

The Executive Committee letter, which Ms. Browining signed on February 5, 1982, expressly advised her that the "female coital area reconstruction" which she would undergo two week's later was, "unproven," "non-standard," "not . . . generally accepted," and "not documented by ordinary standards . . ." A review of the hospital records at any time after the 1982 surgery would have fully reminded Ms. Browning of all the facts of one of her negligence claims. An examination of her chart by counsel would likewise have disclosed that the Executive Committee knew in advance of the unconventional nature of the surgery and pointedly refused to vouch for it.

Had Plaintiffs or their counsel investigated their potential claims against Drs. Burt or Blue, both of whom they had cause to suspect of negligence after the 1982 surgery, they would have seen demonstrated in the hospital chart one of the claims they eventually brought against SEMC. The fact that such claim was not

one on which relief could be granted under *Albain v. Flowers* (1990) 50 Ohio St. 3d 251, does not alter the fact that Plaintiffs had cause to inquire into their rights against SEMC in 1982. Even based on the plainly incorrect legal standard which it applied, the court of appeals overlooked evidence in the record of inferable knowledge on one of her negligence claims against SEMC, knowledge she possessed seven years before she sued.

E. Plaintiffs' Claims Relating to Dr. Burt Accured in 1983, At the Lates, And Are Barred Regardless of What Statute of Limitations Applies.

As previously noted, Plaintiffs state two claims against SEMC, one for negligently credentialling Dr. Burt and the other for negligently credentialling Dr. Blue. The trial court found no need to separate the two claims for purposes of SEMC's motions. It determined that all of Plaintiffs' claims were governed by the one-year statute of limitations and, since accrual occurred more than a year before suit was filed, the entire case was barred. However, the court of appeals (again without the urging of any of the parties) found that Mr. Browning's derivative claims were governed by the four-year statute of limitations, R.C. § 2305.09, and reinstated his claims against Dr. Blue. (Appendix at 15a). That ruling, if correct, *may* also render timely Mr. Browning's derivative claims against SEMC *as they relate to the credentialling of Dr. Blue.*[15] No matter what statute of limitations is applied, though, the entirety of Plaintiffs' claims relating to Dr. Burt are barred.

The record unequivocally establishes that Plaintiffs' claims

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15. If the termination rule still exists (*Allenius* places that in doubt) and applies to a hospital in these circumstances, Mr. Browning's claims relating to Dr. Blue accrued in 1986, when his wife terminated her treatment with Dr. Blue. Plaintiffs' action, brought in 1989, was thus, filed within the four year period.

relating to Dr. Burt accrued in 1983, at the latest. By that time, multiple cognizable events had occurred, alerting Ms. Browning to her condition and putting her on notice to pursue her possible remedies.

Dr. Burt performed surgery on Ms. Browning on February 19, 1982. Prior to that surgery, Ms. Browning's only medical problems were bladder problems and painful sexual intercourse. (Rec. at 88, 93, 157). Following the surgery, she developed a myriad of unusual and exacerbated sumptoms. She experienced worsened bladder problems and worsened sexual problems, as well as newly-developed kidney problems (including severe infections and bleeding), urinary incontinence, vaginal pain, and bowel problems (Rec. at 89-91 96-99, 118, 130-134). She also had to employ an indwelling urinary catheter for six months following her surgery. (Rec. at 130). After the catheter was removed, Ms. Browning became aware of these numerous problems. As she stated, "when he took the catheter out [in 1982] and I couldn't go is when I became aware of I had problems then," (Rec. at 99). At that time she realized that she "should have been able to go on my own without any problems but I wasn't," and that she "wasn't able to void like I should." (Rec. at 130-131). She recognized that this problem with voiding was different from her urinary problems with voiding before the 1982 surgery. (Rec. at 131-132). She also began experiencing new and distinct sexual problems which, according to Ms. Browning, Dr. Burt told her she should not be having. (Rec. at 133). These problems became evident several weeks after her surgery when Plaintiffs attempted to have sex but couldn't because Ms. Browning "wasn't healed up in there like I should have been." (Rec. at 133). She knew that her sexual relationship with her husband "wasn't normal" after the 1982 surgery because her "husband had trouble penetrating. It seemed like it was too small in there. It cause me an awful lot of pain." (Rec. at 134).

Thus, by the fall of 1982, Ms. Browning was well aware of her medical condition and its possible relation to the surgery performed by Dr. Burt. She was in possession of more than enough facts to put a reasonable person on notice of the need to pursue her possible remedies. Ms. Browning, in fact, pursued one such remedy — she stopped treating with Dr. Burt shortly thereafter, in 1983 ("he wasn't doing me any good"). (Rec. at 86, 115, 135). She failed, however to pursue her legal remedies.

Under the cognizable event test of *Allenius v. Thomas* (1989), 42 Ohio St. 3d 131, Ms. Browning's claims relating to Dr. Burt accrued in 1982 (or at the latest, in 1983). Her husband's derivative claims also accrued at that time. *Hershberger v. Akron City Hospital* (1987), 34 Ohio St. 3d 1, 6. Thus, even if the four-year period of limitations applies to Mr. Browning's claims, all of Plaintiffs' claims relating to Dr. Burt expired by 1987, 1987, two years before they filed this action. Accordingly, the trial court was clearly correct in dismissing as time-barred all of Plaintiffs' claims against SEMC for (allegedly) negligently credentalling Dr. Burt.

Proposition of Law No. 2:

A Party Waives Alleged Error When He or She Fails to Raise It In The Common Pleas Court And The Court of Appeals.

The court of appeals erred in applying the four-year statute of limitations to Mr. Browning's derivative claims and the separate cognizable event test to Plaintiff's claims against SEMC, because Plaintiffs waived any such points of error. Mr. Browning *never* asserted, at any state of the proceedings below, that the four-year period of limitations was applicable to his claims. Similarly, Plaintiffs never advocated the separate cognizable event test

utilized by the court of appeals to revive their claims against SEMC.

SEMC's Motion for Summary Judgment sought dismissal of the claims of both Plaintiffs: "Plaintiffs' claims are time-barred because they were not brought within the mandatory one-year time period after accrual of the claims. . . ." (Rec. at 40). The opposition to that Motion did not raise the four-year statute. It implicitly conceded the applicability of the one-year statute, but argued that "discovery" had not occurred until six months before the suit was filed. (Rec. at 166-167).

The judgment entered by the trial court on January 3, 1990 *expressly* dismissed the claims of both Plaintiffs against SEMC. (Rec. at 340). The Notice of Appeal to the Second Appellate Court of Appeals was filed on behalf of "Plaintiffs." (Rec. at 361). On appeal Plaintiffs, again, did not assert that the four-year period of limitations should apply to Mr. Browning's claims. In fact, no error was assigned in the court of appeals on behalf of Mr. Browning at all. On these facts, Plaintiffs effectively stipulated to the applicability of the one-year statute and waived any argument that the four-year provision might apply to any of their claims.

Issues raised *sua sponte* in the court of appeals and not argued in the trial court are not properly before the appellate court. *Ridgley, Inc. v. Board of Zoning Appeals, City of Wadsworth* (1968), 28 Ohio St. 3d 357, 359. Even if a party raises the issue in the court of appeals, it is deemed waived if it was not briefed and argued below. *Thompson v. Preferred Risk Mutual Insurance Company* (1987), 32 Ohio St. 3d 340, 342. Thus, Mr. Browning clearly waived any argument that the four-year statute applies to his claims. *Vance v. St. Vincent Hospital* (1980), 64 Ohio St. 2d 36, 42, fn. 9, overruled on other grounds by *Schwan v. Riverside*

Methodist Hospital (1983), 6 Ohio St. 3d 300 (Failure of plaintiff bringing derivative claims to assert in the trial court applicability of the four-year statute rather than the one-year malpractice period of limitation held to constitute a waiver of that issue).

The same principal of waiver applies to the new, separate cognizable event test developed *sua sponte* by the court of appeals. Plaintiffs *never* advocated at any point in the proceedings below that their claims against SEMC should accrue at a different time than their claims against the Defendant physicians. Plaintiffs *never* argued that discovery of SEMC's alleged negligence was integral to accrual of their claims against the Hospital. To the contrary, Plaintiffs argued, as did SEMC, that accrual of their claims against the Defendant physicians would necessarily cause their claims against SEMC to accrue for purposes of the statute of limitations. For example, in opposing SEMC's Motion for Summary Judgment, Plaintiffs asserted that:

> The Plaintiff filed her complaint on April 17, 1989, six months after she was put on notice of the possibility that her symptoms may have been caused by the wrongful acts of Dr. Burt and Dr. Blue.

(Rec. at 170). Plaintiffs further argued, in conclusion:

> Under the *Allenius* decision, the "cognizable event" which alerted the Plaintiff to *the possibility that she may have received negligent medical care* was her viewing of the West 57th Street program.

(emphasis added) (Rec. at 174). In the court of appeals, Plaintiffs

continued to argue that *discovery of the physicians' malpractice* was the critical event for accrual of their claims:

> In the case at bar, Mrs. Browning, just like the patient in *Herr* [*v. Robinson Memorial Hospital* (1990), 49 Ohio St. 3d 6] was not actually informed of Dr. Blue and Dr. Burt's malpractice until April 3, 1989 when St. Stanisic rendered his expert opinion that malpractice occurred! It was at this precise time that the causal connection as required by *Herr* was established. This event meets the first or causal element of the *Herr* standard. Mrs. Browning was then on notice and in fact did pursue appropriate remedies.

(Rec. at 378)

In short, the separate cognizable event test developed by the court of appeals was wholly unadvocated and, in fact, contradicted the positions taken by the parties throughout the proceedings below. Plaintiffs clearly waived any argument that a separate test for accrual applied to their claims against SEMC or that discovery of the Hospital's alleged negligence was an element of this inquiry. The court of appeals therefore erred in reversing on these grounds.

IV. CONCLUSION

The decision of the court of appeals in this case nodded towards this Court's rulings in *Hershberger* and *Allenius* while discarding their substance. The court of appeals' adoption of a "discovery of the negligence" test, in fact, flies in the face of the repeated decisions of this Court expressly rejecting such a rule.

The court of appeals also erred in eliminating the duty of a Plaintiff to investigate potential claims. A statutory period of limitation constitutes a time to investigate and evaluate potential claims, to decide whether to sue and whom to sue and to begin — or forego — a lawsuit. The limitation period is not a time for mere deliberation of temporizing after the investigation and evaluation are finished. Yet, even though Plaintiff, Ms. Browning was deemed to have discovered her injuries to have connected them to negligent medical care long before filing suit, the court of appeals placed no obligation whatsoever upon her to investigate and identify parties who might be responsible for those injuries. This ruling, carried to its logical extreme, obviates the statute of limitations in most cases and destroys any finality to litigation (or potential litigation) (since Plaintiffs may sue other potentially responsible parties on into the indefinite future as their roles in causing the injuries are, by happenstance, brought to the attention of Plaintiffs).

Proper application of the statute of limitations and "discovery rule" established by the decisions of this Court demonstrates that Plaintiffs' claims are time-barred. SEMC urges this Court to reverse the court of appeals' ruling below and reinstate the trial court's decision dismissing, in their entirety, Plaintiffs' claims against it.

Appendix A

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Appendix A

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following, by first-class U.S. mail, this __ day of __, 1992:

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